IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
CEDAR RAPIDS DIVISION

ROBERT RAKES, ROBERT HOLLANDER, individually, and on behalf of all others similarly situated, Plaintiffs, vs. LIFE INVESTORS INSURANCE COMPANY OF AMERICA, Defendant.	No. C06-0099 **ORDER AMENDING ANSWER**

This matter comes before the Court on the Motion for Leave to Serve and File First Amended Answer (docket number 76) filed by the Defendant on October 12, 2007, the Resistance (docket number 82) filed by the Plaintiffs on October 29, 2007, and the Reply (docket number 84) filed by the Defendant on November 8, 2007. Pursuant to Local Rule 7.1.c, the Motion will be decided without oral argument.

In its Motion for Leave to Amend, Defendant Life Investors Insurance Company of America ("Life Investors") requests permission to file a First Amended Answer (docket number 76-2), adding two ERISA-based defenses. Specifically, Life Investors asserts that Plaintiff Robert Hollander's claims, and those claims of putative class members insured through the group policy sponsored by the National Education Association, are preempted by ERISA. In addition, Life Investors claims that Hollander has failed to exhaust his administrative remedies, as required by ERISA. Plaintiffs Robert Rakes and Robert Hollander resist the Motion for Leave to Amend, arguing that this is not an ERISA case and, therefore, the proposed amendments are "a waste of time."

Absent consent of the adverse party, "a party may amend the party's pleading only by leave of court." FEDERAL RULE OF CIVIL PROCEDURE 15(a). However, "leave shall be freely given when justice so requires." *Id.* Thus, the FEDERAL RULES OF CIVIL PROCEDURE liberally permit amendments to pleadings. *Dennis v. Dillard Dept. Stores, Inc.*, 207 F.3d 523, 525 (8th Cir. 2000).

The right to amend is not, however, without limitation.

> [T]here is no absolute right to amend and a court may deny the motion based upon a finding of undue delay, bad faith, dilatory motive, repeated failure to cure deficiencies in previous amendments, undue prejudice to the non-moving party, or futility.

Baptist Health v. Smith, 477 F.3d 540, 544 (8th Cir. 2007) (citing *Doe v. Cassel*, 403 F.3d 986 (8th Cir. 2005)).

Plaintiffs in this case argue that this is not an ERISA action and Life Investors' proposed affirmative defenses in that regard are, therefore, futile. Plaintiffs provide the Court with a detailed argument that Plaintiff Robert Hollander's long-term care policy is not an "employee welfare benefit plan" as defined under ERISA. Therefore, according to Plaintiffs, Life Investors' arguments that Hollander's claims are preempted by ERISA or that Hollander failed to exhaust his administrative remedies fail on their merits. Plaintiffs invite the Court to "conduct a thorough analysis of the applicable law to determine futility."

"Futility is a valid basis for denying leave to amend." *U.S. ex rel. Lee v. Fairview Health System*, 413 F.3d 748, 749 (8th Cir. 2005). A motion to amend should be denied on the merits, however, "only if it asserts clearly frivolous claims or defenses." *Becker v. University of Nebraska*, 191 F.3d 904, 908 (8th Cir. 1999) (quoting *Gamma-10 Plastics, Inc. v. American President Lines, LTD*, 32 F.3d 1244, 1255 (8th Cir. 1994)). "Likelihood of success on the new claim or defenses is not a consideration for denying leave to amend unless the claim is clearly frivolous." *Id.*

When a court denies leave to amend on the ground of futility, it means that the court reached a legal conclusion that the amendment could not withstand a motion for judgment on the pleadings. *In re Senior Cottages of America, LLC*, 482 F.3d 997, 1001 (8th Cir. 2007). The Court declines the opportunity to address the merits of Life Investors' proposed additional defenses at this time.[1] The Court believes those issues are more properly addressed in a motion for judgment on the pleadings, pursuant to FEDERAL RULE OF CIVIL PROCEDURE 12, or on a motion for summary judgment, pursuant to FEDERAL RULE OF CIVIL PROCEDURE 56.

Defendant's instant Motion for Leave to Amend was filed on October 12, 2007, the deadline established by the Amended Scheduling Order (docket number 75). The Court finds no evidence of "undue delay, bad faith, dilatory motive, repeated failure to cure deficiencies in previous amendments, [or] undue prejudice to the non-moving party." As indicated above, the Court believes that the alleged futility of the amendments should be addressed using a different procedural device. Accordingly, the Court finds that Defendant's Motion for Leave to Amend should be granted.

ORDER

IT IS THEREFORE ORDERED that the Motion for Leave to Serve and File First Amended Answer (docket number 76-1) filed by Defendant is hereby **GRANTED**. The Clerk of Court shall detach and separately docket Defendant's First Amended Answer (docket number 76-2), attached to the instant Motion.

DATED this 9th day of November, 2007.

_____
JON STUART SCOLES
United States Magistrate Judge
NORTHERN DISTRICT OF IOWA

[1]The Court also notes that a Magistrate Judge lacks jurisdiction to consider a dispositive motion. *See* 28 U.S.C. § 636.